IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGNAL SIDE JURISDICTION

Arbitration Application No.23 of 2007

M/s Vardhaman builders
a partnership firm and
having its registered office t
Vardhaman Mansion, 110,
Keshavji Naik Road, Chinch
Bunder, Mumbai 400009 ..Applicants

vs

l. Shri Narendra Balasaheb Ghatge
Indian Inhabitant, residing at
Parshuram Niwas, Mahadeobhai
Desai Road, Borivli (East)
Mumbai 400066

2.Shri Nilesh Vasant Ghatge
Indian Inhabitant residing at
Surya Darshan, 2nd floor,
Mahadeobhai Desai Road
Borivli East Mumbai 400066 . Respondents

Ms Madhavi Tavanandi i/b Mulla and Mulla & Co
for the applicants.

Mr M.P. Vora for respondents

CORAM: SWATANTER KUMAR,C.J.

Judgment reserved on 22.6.2007.
Judgment pronounced on 19.7.2007

JUDGMENT:-

The applicants' prayer for appointment of named sole arbitrator in accordance with the provisions of section 11(6) of the Arbitration and Conciliation Act, 1996, hereafter referred to as the “Act”, is opposed by the respondents on the ground that (a) the application itself is not maintainable in view of the bare contents of provisions of section 69(3) of the Partnerships Act and the same is liable to be dismissed and (b) the Respondents submit that they are not aware of any arbitration agreement or memorandum of understanding, thus there is no existing and binding agreement between the parties.

2. In order to examine the merit or otherwise of the contentions of the respondents, I may refer to the relevant facts of the case. The applicant is a partnership firm engaged in the business of development of property and construction of buildings for residential purpose. They claim to be the owners of immovable property admeasuring about 1580.28 square meters bearing TPS No 49/CTS No.323 situated at Mahadeobhai Desai Road, Borivli East, Mumbai. The applicants claim to have entered into an agreement with the father of respondent No.2, late Mr. Vasant Balasaheb Ghatge. Under the terms of the said agreement, the property was to be

developed jointly by the parties and the respondents were to receive a sum of Rs.1.25 crores and 30% ;of the net profits accruing as a result of the development and exploitation of the said property. After the death of their father the respondents executed a memorandum of understanding dated 27th August 2005 wherein it was agreed that the said property would not be developed as a joint venture but would be developed exclusively by the applicants at the lump sum consideration of Rs.1.50 crores. The agreement dated 27th August 2005 contains arbitration clause No.18, which reads as under:

> " All dispute and differences which may arise between the parties hereto form or out of or in any manner whatsoever relating or incidental to these presents, shall be referred to Arbitration of a sole Arbitrator as may be mutually agreed upon by the parties hereto. Such Arbitration shall be governed by the provisions of the Arbitration and Conciliation Act, 1996 or any statutory modification or reenactment thereof for the time being in force. Arbitrator shall have power to grant interim and ad-interim relief. The award of the Arbitrator/s shall be final and binding upon the parties. Such arbitration shall be held in Mumbai".

3. In pursuance to the agreement, the applicants claim to have paid to the respondents a sum of Rs. 22 lacs i.e. Rs.11 lacs to each of the respondent. The balance amount was payable in terms of clauses of the said agreement. Certain disputes arose between the parties and the respondents vide letter dated 2nd January 2006, though confirmed receipt of applicants' letter dated 28th December 2005, informed them that they were ready to pay certain amount and asked the applicants not to make any payment. By the passage of time further dispute arose between the parties and vide letter dated 26th June 2006 the respondents informed the applicants that there were certain oral understanding which have not been fulfilled, which further aggravated the dispute. The applicants on 8th August 2006 through their advocates required the respondents to take steps in terms of the agreement, failing which the applicants would proceed further against the respondents, but no reply was received. Thereafter another letter dated 2nd September 2006 was addressed invoking arbitration clause for reference of the dispute to the sole arbitration of Shri Harakchand Gada, Advocate. To that letter and even to letter dated 28th October 2006 no reply was received and the respondents failed to act in terms of the notice and arbitration agreement between the parties, resulting in filing of the present

application. According to the applicants the disputes relate to the agreement as well as the memorandum of understanding executed between the parties . In the reply filed by the respondents, besides taking the above two objections, it is stated that under clause 19 of the MOU dated 27th August 2005, the Bombay court alone shall have jurisdiction and the applicants firm is not registered. It was stated that there was no valid and binding contract between the parties and the MOU cannot constiute arbitration agreement or contract in law. However, in the reply, it is nowhere stated that the father of the applicants had not entered into an agreement dated 27th August 2005 and respondents had not signed the MOU.

4. As far as the first argument of the respondents with regard to the application under section 11(6) of the Act being barred by the provisions of section 69(3) of the Partnerships Act is concerned, it is not necessary for me to deal with this issue any further as the matter is no more res-integra as has been clearly held by the Division Bench judgment of this court in the case of Masood Mohammed Husain vs Gulam Rasul Mohammedali, 2007(2) Bom C.R 291 where the court held as under:

> **"8. In Firm Ashok Traders and another vs. Gurumukh Das Saluja and others, 2004 (1) Arb.LR 141 (SC), inter alia, the Supreme Court considered the question of**

maintainability of application under Section 9 of the Arbitration and Conciliation Act, 1996 moved by a partner of an unregistered firm. The Supreme Court held that the bar indicated by Section 69 of the Partnership Act does not affect the maintainability of an application under Section 9 of the Arbitration and Conciliation Act. It was held that the relief sought for in an application under Section 9 is neither a suit nor a right arising from contract. This is how the Supreme Court considered the matter:

"The relief sought for in an application under Section 9 of the Arbitration and Conciliation Act is neither in a suit nor a right arising from a contract. The right arising from the partnership deed or conferred by the Partnership Act is being enforced in the Arbitral Tribunal the Court under Section 9 is only formulating interim measures so as to protect the right under adjudication before the Arbitral Tribunal from being frustrated. Section 69 of the Partnership Act has no bearing on the right of a party to an Arbitration Clause to file an application under Section 9 of the Arbitration and Conciliation Act."

It is true the aforesaid consideration is preceded by the observation of the Supreme Court that the opinion was 'prima facie' and also concluded by the observation that view was taken 'tentatively'.

13. As noticed above, in Jagdish Chandra Gupta's case, the Supreme Court was concerned with the application under Section 8(2) of the Arbitration Act, 1940, while in the case of Kamal Pushpa Enterprises, the Apex Court was concerned with the proceeding regarding making the Award rule of the Court and the effect of Section 69 of the Indian Partnership Act on the unregistered firm. U.P. State Sugar Corporation Limited is a case of an application under Section 20 of the Arbitration Act, 1940. In none of these three cases, the Supreme Court was directly concerned with the maintainability of an application under Section 9 of the Arbitration and Conciliation Act, 1996, moved by a partner of an unregistered firm. This question has been directly considered by the Supreme Court in the case of Firm Ashok Traders. Though the Supreme Court has expressed its opinion to be 'prima facie' and 'tentative', in our considered view the opinion that an application under Section 9 of the Arbitration and Conciliation Act, is neither in a suit nor a right arising from a contract is founded on a sound legal principle that a right arising from

a partnership deed or conferred by the Partnership Act is enforced in a arbitral tribunal and the Court under Section 9 is only formulating interim measure so as to protect the right before the arbitral tribunal from being frustrated. For consideration of the application under Section 9, we think that the Court can use this decision as a precedent guiding the Courts the course to be adopted confronted with a situation like an application under Section 9 of the Arbitration and Conciliation Act being moved by a partner of an unregistered firm. We have no hesitation in adopting the reasoning given by the Supreme Court in the case of Firm Ashok Traders. We may also notice that in subsequent case in the matter of U. P. State Sugar Corporation Ltd., the Supreme Court did not say anything about the correctness of the decision in Firm Ashok Traders on the ground that it was not in question before them and it was not necessary to say anything in that behalf."

In view of the above decision of the Division Bench the argument raised is bound to be rejected.

5. The other objection with regard to the fact that the applicants who filed suit for specific performance,the dispute capable of being referred to the arbitral tribunal is also equally without any merit, keeping in view that the judgment of this court in the case of M/s Farohar and Co and ors vs. Hemant Manohar Nabar and ors, AIR 1992 Bombay 8 wherein the court, relying upon the judgment of the Supreme Court in the case of Continental Construction Co. Ltd. Vs State of Madhya Pradesh AIR 1988 SC 1166, held that such dispute with regard to immovable property or specific performance thereof was referable to arbitration. The applicant has not placed on record

the agreement dated 30th November 2003 but had placed on record the MOU dated 27th August 2005 which in terms refers to 30th November 2003 agreement. This MOU of 27th August 2005 is stated to have been signed by the parties and is a registered document. Clause 20 of the said agreement clearly states that all the terms and conditions of the earlier MOU dated 30th November 2003, which are not inconsistent with the MOU of 2005, shall be followed and continued to operate. Clause 18 of the MOU, which is already reproduced above, clearly shows that all the disputes and differences between the parties would be referred to the sole arbitration as may be mutually agreed upon by the parties and the Arbitration shall be governed by the provisions of the Arbitration and Conciliation Act, 1996. The arbitration clause is wide enough to cover any kind of dispute. It has been stated in the arbitration clause that "all disputes and differences which may arise between the parties and from or out of or in any manner whatsoever relating to incidental to these presents" are to be referred to the arbitration. Reference can be made to the judgment of the Supreme Court in the case of Olympus Superstructures Pvt Ltd vs Meena Vijay Khetan and ors, AIR 1999 SC 2102 where the court stated that such an arbitration clause would be wide enough and all such matters would be covered under the arbitration clause.

6. Again the notice issued by the applicants, including notices dated 15th December 2005, 28th October 2006 and 8th August 2006 to the respondents had clearly asked for invocation of the arbitration clause and even appointment of sole arbitrator vide letter dated 28th October 2006. The applicants even informed the respondents that their letter dated 8th August 2006 had been received by the respondents on 10th August 2006 and no reply was received. Apparent conclusion of the above events is that the respondents have failed to act in terms of the existing and binding arbitration clause between the parties despite notice. They have lost their right in terms of the judgment of the Supreme Court in the case of Datar Switchgears Ltd vs Tata Finance Ltd and anr. (200) 8 SCC 151 and S.B.P and Co vs Patel Engineering Ltd and anr. 2005(3) Arb L.R. 285 (SC).

In view of the above discussion I find no merit in the objection raised by the respondents and thus I allow this application under section 11(6) of the Act and hereby appoint Smt K.K.Baam, retired High Court Judge, as the sole arbitrator, who may enter upon the reference and proceed with in accordance with law. Parties are left to bear their own costs.

Prothonotary and Senior Master to communicate this order to the learned Arbitrator.

CHIEF JUSTICE